

**UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

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In re: Docket Nos. 50-247-LR; 50-286-LR

License Renewal Application Submitted by ASLBP No. 07-858-03-LR-BD01

Entergy Nuclear Indian Point 2, LLC, DPR-26, DPR-64
Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc. August 3, 2012
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**STATE OF NEW YORK ANSWER TO NRC STAFF'S MOTION IN LIMINE TO
EXCLUDE CERTAIN REBUTTAL EXHIBITS FILED BY THE STATE OF NEW YORK
CONCERNING CONTENTION NYS-5**

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TABLE OF CONTENTS

INTRODUCTION1

ARGUMENT.....1

POINT I

THE BOARD HAS MADE CLEAR THAT STATEMENTS OF POSITION ARE NOT EVIDENCE AND ARE NOT SUBJECT TO ADMISSIBILITY STANDARDS.....1

POINT II

THE DEAN DECLARATION PROPERLY INTRODUCES TWO PUBLICLY-AVAILABLE NRC DOCUMENTS THAT ARE PROPERLY CONSIDERED EVIDENCE BECAUSE THEY ARE GOVERNMENTAL RECORDS AND THEY RESPOND TO RECENT ENTERGY AND NRC STAFF STATEMENTS.....2

CONCLUSION.....4

INTRODUCTION

On July 30, 2012, Counsel for the Nuclear Regulatory Commission Staff filed a motion in limine asserting that two NRC publicly-available rebuttal exhibits referenced in the State's Statement of Position for Contention NYS-5 should be stricken from the record, along with an attorney declaration attesting to the fact that these documents are publicly available on NRC's ADAMS document management website. As this Board has already advised parties including NRC Staff that such motions are not to be countenanced, this motion is without merit and must be dismissed.

ARGUMENT

POINT I

THE BOARD HAS MADE CLEAR THAT STATEMENTS OF POSITION ARE NOT EVIDENCE AND ARE NOT SUBJECT TO ADMISSIBILITY STANDARDS

This Board has already made clear on several occasions that “regarding ... challenge[s] to ... Initial Statement[s] of Position, this document is not evidence, but rather consists merely of attorney arguments. Any motion to strike “testimony” in this document is inappropriate.” *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 and 3), Order (Granting in Part and Denying in Part Applicant's Motions in Limine) (Mar. 6, 2012)(“Board Order”) at 14; *see also id.* at 19 (“Statements of positions are not evidence. Thus, the admissibility standards of Section 2.337(a) do not apply and statements of positions are not subject to evidentiary challenge.”); *id.* at 24 (“Finally, statements of position are a party's legal interpretation of its evidence, not its actual evidence, and we will use it inasmuch as it is supported by the evidence ... Therefore, we will not exclude ... portions of [a] Statement of

Position.”). As such, Staff’s motion to strike portions of the State’s Statement of Position should be denied.

POINT II

THE DEAN DECLARATION PROPERLY INTRODUCES TWO PUBLICLY- AVAILABLE NRC DOCUMENTS THAT ARE PROPERLY CONSIDERED EVIDENCE BECAUSE THEY ARE GOVERNMENTAL RECORDS AND THEY RESPOND TO RECENT ENTERGY AND NRC STAFF STATEMENTS

Staff seeks to strike the declaration of Assistant Attorney General Janice A. Dean and two publicly-available NRC documents:

1. Exhibit NYS000400, Transcript of hearing held on July 23, 2008, in *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station); and
2. Exhibit NYS000401, Excerpt from Appendix B to the License Renewal Application for Grand Gulf Nuclear Station.
3. Exhibit NYS000402, Declaration of Janice A. Dean (June 29, 2012), attesting to the authenticity of the Ex. NYS000400 and NYS000401.

In context, the State used the transcript of Judge Karlin’s statements to respond directly to Entergy’s statement that “the NRC Staff’s Supplemental SER explicitly documents Entergy’s presentations regarding the revised number of planned buried piping inspections,” and to indicate to the Board that, as has been observed in other proceedings, the SER is not binding and cannot be the source of a binding commitment. *See* State of New York’s Revised Statement of Position Regarding the Adequacy of Entergy’s Aging Management Program for Buried Pipes and Tanks (Contention NYS-5) (“State’s Revised Statement of Position”) at 9, quoting *In the Matter of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station) (July 23, 2008) Hearing Transcript at 1214:14-21 (ML082330392) (NYS000400). This transcript is an NRC-generated document, available on the NRC’s publicly-

available ADAMS document management website (as the Dean Declaration verifies). Staff has not provided any legal basis for objecting to the inclusion of this transcript excerpt for the purpose of directly responding to Entergy's statement. Staff admits that "rebuttal testimony may be admitted only insofar as it is responsive to the other parties' statements of position and evidentiary submissions." Staff Motion at 4; *see also* 10 C.F.R. § 2.1207(a)(2)(written responses and rebuttal testimony should be "directed to the initial statements and testimony of other participants.")). Staff's admission defeats its motion.

Similarly, the State's reference – in a footnote – to Entergy's installation of cathodic protection at another of its facilities (Grand Gulf) responds directly to Entergy and Staff's assertions that Entergy's Aging Management Program complies with NRC Staff's Draft Interim Staff Guidance Document. The State referenced Grand Gulf to support its position that Entergy provided no justification for its decision not to install cathodic protection at Indian Point as required by the Draft ISG, which is evidently possible given that Entergy has done it at another of its facilities. State's Revised Statement of Position at 16, n.13. The State did not assert that conditions were identical at both locations, or anything other than the simple fact that Entergy did replace cathodic protection at another of its facilities. As such, Staff's argument is unavailing.

Finally, as Staff observes, the Dean Declaration merely attests to the authenticity of the above two documents and serves no other purpose. As such, it is unobjectionable on its face and is proper as the vehicle for authenticating publicly available documents.

Staff's argument, taken to its logical conclusion, would mean that no publicly available document could be introduced into evidence unless someone present – here, perhaps Judge Karlin himself – physically appeared in this proceeding as a witness to attest to the accuracy of

the underlying document. Such an outcome is absurd and legally unsupportable under the Federal Rules of Evidence and is contrary to Staff's desire to streamline proceedings.

CONCLUSION

For the above-stated reasons, the State of New York respectfully requests that the Board deny Staff's Motion.

Respectfully submitted,

Signed (electronically) by

Janice A. Dean
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Dated: August 3, 2012

Certificate Pursuant to 10 C.F.R. § 2.323

In accordance with the Board's Scheduling Order of July 1, 2010 (at 8-9) and 10 C.F.R. § 2.323(b), the undersigned hereby certifies that I have made a sincere effort to make myself available to listen and respond to the moving party, and to resolve the factual and legal issues raised in the motion, and that my efforts to resolve the issues have been unsuccessful.

Signed (electronically) by

Janice A. Dean
Assistant Attorney General
August 3, 2012